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JUL 23 2004

OFFICE OF PETITIONS

In re Application of	:	
Koebe, et al.	:	DECISION DISMISSING
Application No. 10/769,215	:	PETITION
Filed: January 31, 2004	:	
Attorney Docket No. 10543-074	:	

This is a decision on the petition under 37 CFR §1.10(d), filed June 10, 2004, requesting that the above-identified application be accorded a filing date of January 30, 2004, rather than the presently accorded filing date of January 31, 2004.

The petition is dismissed.

Applicants request the earlier filing date on the basis that the application was purportedly deposited in Express Mail service (Express Mail mailing label #EV329459312US) on January 30, 2004, pursuant to the requirements of 37 CFR §1.10. However, applicant states the Express Mail mailing label identified in the original application papers indicates an erroneous "date-in" of January 31, 2004. Applicants allege that the date of mailing indicated by the Express Mail mailing label is a U.S. Postal Service (USPS) error and the correct date of mailing is January 30, 2004.

Petitioner contends, "This Express Mail envelope, along with several other Express Mail envelopes, were picked up at the Law offices of the undersigned on January 30, 2004 by an employee of the United States Postal Service. Written confirmation of this pickup is evidenced by the attached United States Postal Service Pickup Service Statement (enclosed as Attachment B), which clearly bears the signature of the United States Postal Service employee and the pickup date of January 30, 2004. Postal employees picking up Express Mail at our offices are not permitted by the USPS to fill out the Express Mail Receipt, but are permitted to sign a pickup Log.

Upon receipt of the filled in Express Mail Receipt it was noted that the date had been filled in incorrectly as January 31, 2004. A copy of the filled in customer copy of the Express Mail Label, showing the incorrect date in as January 31, 2004, is provided as Attachment C. It is this date that is entered as the filing date on the Official Filing Receipt."

In support, the petition is accompanied by a copy of the application as filed, an unexecuted combined Declaration and Power of Attorney, a copy of a return receipt postcard dated 01/31/04, a copy of a check made out to the United States Patent and Trademark Office for \$770.00 and dated 1/30/04, an Information Disclosure Statement with PTO Form 1449 and a declaration by Terry Wand.

Paragraph (a) of 37 CFR §1.10 states that:

"Any correspondence received by the Patent and Trademark Office (Office) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS. The date of deposit with the USPS is shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be accorded the Office receipt date as the filing date. See §1.6(a)."

(Emphasis supplied).

Paragraph (d) of 37 CFR §1.10 states that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

- (1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;

- (2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and
- (3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS. Any statement submitted in support of such a showing pursuant to this paragraph must be a verified statement if made by a person other than an employee of the USPS or a practitioner as defined in §10.1(r) of this chapter. (Emphasis supplied)

A grantable petition under 37 CFR §1.10(d) must include "a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day." In addition, the showing "must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the 'Express Mail Post Office to Addressee' service of the USPS."

The petition filed June 10, 2004, is not accompanied by the corroborating evidence required by the rule. Though petitioner states a copy of the Express Mail label and a copy of a United States Postal Service Pickup Service Statement has been submitted, neither item can be located in the application file.

As such, at the present time, the petition must be dismissed. However, this decision is made without prejudice to reconsideration.

Any request for reconsideration should be filed within **TWO MONTHS** of the date of this decision in order to be considered timely. This time period may not be extended pursuant to 37 CFR 1.136.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
 Commissioner for Patents
 Box 1450
 Alexandria, VA 22313

By FAX: (703) 872-9306
 Attn: Office of Petitions

By hand: Customer Service Window
 2011 South Clark Place
 Crystal Plaza Two (left side entrance of building)
 Arlington, VA

The application is being returned to Technology Center 2800 for examination *in due course*, with the presently accorded filing date of January 31, 2004.

Telephone inquiries concerning this matter may be directed to the undersigned at (703) 306-9200.

A handwritten signature in dark ink, appearing to read 'EJ Tannouse', with a long horizontal line extending to the right.

Edward J. Tannouse
Petitions Attorney
Office of Petitions
United States Patent and Trademark Office